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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

RIN 0648-BD57

[Docket No. 130802674-4422-02]

Fisheries off West Coast States; Highly Migratory Fisheries; California Drift Gillnet Fishery;
Sperm Whale Interaction Restrictions

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric
Administration (NOAA), Commerce.

ACTION: Temporary rule.

SUMMARY: Pursuant to its emergency authority, NMFS renews an emergency action that implemented, among other measures, mandatory monitoring (VMS) and observer requirements (pre-trip notification and a 100% deep water closure zone unless a NMFS-certified observer was on board) in the California thresher shark/swordfish drift gillnet (mesh size \geq 14 inches) (DGN) fishery during the August 15, 2013 to January 31, 2014 fishing season, and would have immediately shut down the fishery for the calendar year in the event of a sperm whale interaction in the DGN fishery. This renewing action is necessary to ensure that the conservation measures continue to provide protection for sperm whales until permanent measures are in place.

Specifically, per recommendations of the Pacific Offshore Cetacean Take Reduction Team, NMFS is currently developing a rule under authority of the Marine Mammal Protection Act

(MMPA) in order to adequately monitor the DGN fishery and reduce the risk of sperm whale interactions.

DATES: This rule is effective from [Insert date of publication in the FEDERAL REGISTER], through August 5, 2014. Comments must be received on or before [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Requests for copies of documents supporting the temporary rule may be obtained from the West Coast Regional Office, NMFS, 501 W. Ocean Blvd., Ste. 4200, Long Beach, CA 90802.

You may submit comments on the temporary rule, identified by NOAA-NMFS-2013-0131, by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0131, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- Fax: 562-980-4047; Attention: Craig Heberer.

- Mail: Craig Heberer, Southwest Regional Office, NMFS, 501 W. Ocean Blvd., Ste. 4200, Long Beach, CA 90802.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments

(enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Requests for copies of documents supporting this rule may be obtained from the West Coast Regional Office, NMFS, 501 W. Ocean Blvd., Ste. 4200, Long Beach, CA 90802
FOR FURTHER INFORMATION CONTACT: Craig Heberer, telephone: 706-431-9440 (#303), fax: 562-980-4047, e-mail: craig.heberer@noaa.gov.

SUPPLEMENTARY INFORMATION: The DGN fishery is managed under the Federal Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP). The HMS FMP was prepared by the Pacific Fishery Management Council (Council) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) by regulations at 50 CFR part 660.

Background

On September 4, 2013, NMFS published in the Federal Register a temporary rule (78 FR 54548) for emergency action to modify the California swordfish/thresher shark DGN fishery for the 2013-2014 fishing season under authority of section 305(c)(1) of the MSA. The purpose of the temporary rule stems from the observed entanglement of two sperm whales by a DGN fishing vessel in 2010 and the need to reduce the risk associated with sperm whale bycatch in the DGN fishery for the 2013-2014 fishing season, in accordance with the MSA, Endangered Species Act (ESA) and the MMPA. Implementation of the temporary regulations allowed NMFS to issue an MMPA 101(a)(5)(E) permit providing coverage for sperm whale takes in the DGN fishery. The temporary regulations implemented, among other measures, mandatory monitoring (VMS) and observer requirements (pre-trip notification and a 100% deep water closure zone unless a NMFS-certified observer was on board), and would have immediately shut

down the fishery for the calendar year in the event of a sperm whale interaction. A full discussion of the background and justification for the temporary rule emergency measures was presented in the preamble prepared for that action and is not repeated here.

The temporary rule expired on January 31, 2014, which corresponded with the traditional end of the DGN fishing season. From February 1 through April 30, the DGN fishery is prohibited from operating inside the West Coast Exclusive Economic Zone (EEZ). See 50 CFR 660.713(d). No fishing effort has occurred during this period due to the distance involved in transiting to fishing areas beyond the EEZ, coupled with a lack of swordfish availability. The DGN fishery is allowed access inside the EEZ off the coasts of California and Oregon from May 1 through August 14, but is prohibited from operating within 75 miles of the coast. Very little DGN fishing effort typically takes place during this time due mainly to the lack of swordfish availability. The core of the DGN fishery, and virtually all of the contemporary fishing effort, takes place from August 15 through January 31. NMFS took public comment on the original temporary rule commencing September 4, 2013, and ending on October 4, 2013.

This action is necessary to retain in force the earlier temporary regulations, while NMFS develops a permanent rule to adequately monitor the DGN fishery and minimize sperm whale interactions by the fishery. Without the temporary regulations remaining in place, the DGN fishery may not be properly monitored, and therefore might risk additional negative sperm whale interactions, contrary to the MMPA and ESA.

Classification

The Assistant Administrator for Fisheries, NOAA (AA) finds that providing the public with notice and an opportunity comment on this action would be contrary to the public interest, and therefore waives this requirement of the Administrative Procedure Act (APA).

An owner/operator of a federally-permitted DGN fishing vessel has informed NMFS that he may fish for thresher shark/swordfish on or after May 1, 2014, when the DGN fishery can legally operate within the EEZ, but outside 75 miles from the coast of California. Prohibiting unobserved DGN vessels from fishing in the EEZ off California in waters seaward of the 1,100 fm (2,012 m) depth contour, and setting a limit of one serious injury/mortality to sperm whales interacting with DGN gear, will protect sperm whales from potential interactions with the DGN fishery, such as occurred in 2010, where two sperm whales became entangled in DGN fishing gear. NMFS' long term research vessel sightings of sperm whales in the California Current indicate that 90 percent of sightings occurred in waters deeper than 1,100 fm (2,012 m). Further, NMFS' analyses of DGN observer data indicate that an average of approximately 13 percent of total annual DGN fishing occurred in the deeper water zone in years 2009 through 2011. NMFS' Southwest Fisheries Science Center scientists have suggested that reducing spatial overlap of fishing effort and sperm whale habitat may be an effective means to reduce the risk of sperm whale bycatch. There is no action that NMFS can take through the normal rulemaking process that would enable NMFS to implement the requirement for observer monitoring of DGN vessels in the deeper water area and the cap of one sperm whale serious injury/mortality for the DGN fishery to reduce the bycatch risk of this species before the DGN fishery begins actively fishing in waters inhabited by sperm whales. This emergency action enables NMFS to keep the fishery operating while a permanent rule is under development, thus avoiding unnecessary adverse biological and economic impacts.

Without this rule, sperm whales will be at risk of unauthorized takings, possibly leading to injury or death, which is contrary to the public interest in protecting these marine mammals. Due to the urgent need to protect sperm whales before NMFS issues any final rule, NMFS is waiving

the public notice and opportunity for comment under the APA. However although this action is being implemented without notice and request for advance public comment, NMFS is seeking public comment on this rule for purposes of identifying possible measures for long-term management.

For these same reasons stated above, pursuant to 5 U.S.C. 553(d)(3), the AA finds good cause to waive the full 30-day delay in effectiveness for this rule. It would be contrary to the public interest if this rule does not become effective immediately, because the DGN fishery can fish within 75 nautical miles of shore starting May 1 through August 14. Without this emergency rule, NMFS would not provide 100 percent observer coverage in the deeper water area with higher concentrations of sperm whales, or be able to close the fishery in the event that there is one serious injury or mortality to a sperm whale in the DGN fishery. These measures are needed to provide adequate protections for sperm whales during the 2014-2015 DGN fishing season while a permanent rule is under development. For these reasons, there is good cause to waive the requirement for delayed effectiveness. The need to implement these measures in a timely manner constitutes good cause under authority contained in 5 U.S.C. 553(d)(3), to make the rule effective immediately upon publication in the Federal Register.

Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

This rule has been determined to be not significant for purposes of Executive Order 12866. A Regulatory Impact Review was completed and is available upon request from the NMFS, Southwest Region.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: May 14, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

PART 660--FISHERIES OFF WEST COAST STATES

1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq. and 16 U.S.C. 773 et seq.

2. In § 660.713, paragraph (f) is added to read as follows:

§ 660.713 Drift gillnet fishery.

* * * * *

(f) Sperm whale take mitigation measures. (1) Drift gillnet (mesh size \geq 14 inches) fishing without a NMFS-trained observer is prohibited in the portion of the California EEZ bounded by lines connecting, in order, the following points:

Point	North lat.	West long.	
A	42°0'0"	125°10'12'	Oregon Border at 1100 fm
B	40°22'12"	124°45'0"	
C	40°22'12"	125°45'0"	
D	38°21'0"	123°52'12"	
E	37°29'24"	123°18'0"	
F	37°29'24"	123°30'36"	
G	37°0'0"	123°30'0"	
H	36°36'0"	122°27'0"	
I	36°16'12"	122°31'12"	
J	35°52'30"	122°16'48"	
K	35°0'0"	121°45'0"	
L	34°54'0"	122°0'0"	
M	34°0'0"	122°0'0"	
N	34°0'0"	121°9'0"	
O	32°21'0"	120°0'0"	
P	31°6'0"	118°45'0"	
Q	30°32'31"	121°52'1"	SW corner of CA EEZ
R	EEZ Western Edge		200nm buffer from the U.S. Pacific Coast Shoreline
S	42°0'0"	129°0'0"	NW border of OR EEZ
A	42°0'0"	125°10'12'	Finish back at Point A

(2) As soon as practicable following determination by the Regional Administrator that one serious injury to, or mortality of, a sperm whale has resulted from drift gillnet fishing during the period of this emergency rule, the Regional Administrator will contact the fleet via VMS

communication and provide the effective date and time that all fishing by vessels registered for use under a drift gillnet permit are prohibited from swordfish fishing until August 5, 2014.

Coincidental with the VMS communication, the Regional Administrator will also file a closure notice with the Office of the Federal Register for publication; notify all permit holders by postal mail, and a post a notice on the NMFS regional website.

(3) Drift gillnet vessel owners/operators are required to notify the NMFS-designated observer provider at least 48 hours prior to departing on all fishing trips. Vessel owners/operators must provide to the observer provider their name, contact information, vessel name, port of departure, and estimated date and time of departure, and a telephone number at which the owner or operator may be contacted during the business day (8 a.m. to 5 p.m.) to indicate whether an observer will be required on the subject fishing trip.

(4) Drift gillnet vessel owners/operators must provide NOAA OLE with a declaration report before the vessel leaves port on a trip in which the vessel will be used to fish swordfish with drift gillnet gear in U.S. ocean waters between 0 and 200 nm offshore of California.

(5) Drift gillnet vessel owners are required to install a NMFS OLE type-approved mobile transceiver unit and to arrange for a NMFS OLE type-approved communications service provider to receive and relay transmissions to NMFS OLE prior to swordfish fishing during the period of this emergency rule. Vessel owners/operators shall perform the same requirements consistent with 50 CFR 660.14.